

ISSUES

The Administrative Law Judge found claimant entitled to a referral for vocational rehabilitation assessment. The respondent and insurance carrier requested this review and contend K.S.A. 44-506 is unconstitutional as applied to the facts of this case. That is the issue now before the Appeals Board.

FINDINGS

After reviewing the entire record, the Appeals Board, finds, as follows:

Neither the Appeals Board, nor the Division of Workers Compensation, has the authority to decide the constitutionality of K.S.A. 44-506. Therefore, the Orders of the Administrative Law Judge granting vocational rehabilitation assessment remain in full force and effect.

The facts are relatively simple. In June 1993, the claimant, Ronald Gates, while in Texas, telephoned the respondent in response to a help wanted ad requesting painters to work in the U.S. Virgin Islands. As a result of this initial telephone conversation, claimant forwarded a copy of his resume to the respondent and provided a telephone number in Topeka, Kansas, where he could be reached. Claimant left Texas and by a circuitous route through Florida returned to his hometown of Topeka where he resided at his mother's home. Upon arrival in Topeka, claimant learned the respondent had telephoned. Claimant returned the telephone call while in Topeka and accepted respondent's offer of employment. Several days later, respondent sent claimant airline tickets for the Virgin Islands. Claimant flew to the islands, began work, and suffered a work-related injury. The Appeals Board finds that the last act necessary to consummate the employment contract occurred during the second telephone conversation when claimant was in Topeka, Kansas.

A contract is created when and where the last act necessary for its creation is done. When the last act is acceptance of an offer during a telephone conversation, the contract is created where the acceptor speaks his acceptance. See Neumer v. Yellow Freight System, Inc., 220 Kan. 607, 556 P.2d 202 (1976).

Respondent argues the contract of employment was entered into either during the first telephone conversation when claimant was in Texas, or when the claimant signed a document purporting to be an employment contract presented to him in the Virgin Islands after he had already begun work. The argument is without merit and contrary to the weight of the evidence. Claimant's version of the facts surrounding the employment contract is credible and persuasive.

Respondent is a Delaware corporation and maintains its principal place of business in Illinois. No offices or personnel are in Kansas, nor does it advertise or regularly conduct business in this state. Although respondent had minimal contact with the state of Kansas, we conclude the contract of employment was created in Kansas, and, therefore, the Kansas Workers Compensation Act is applicable under the provisions of K.S.A. 44-506 which provides, in part:

"...*Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) or the contract of employment was made within the state, unless such contract otherwise specifically provides..."

Respondent argues K.S.A. 44-506 is unconstitutional in this instance and violates the due process principles of the Fourteenth Amendment to the United States Constitution, because the respondent lacks "minimum contacts" for the State of Kansas to exercise jurisdiction over it. Although we do not intend to close the door on all constitutional challenges, the Appeals Board finds, in this instance, it is not empowered to adjudicate the constitutionality of K.S.A. 44-506. Statutes are presumed to be constitutional. See Blue v. McBride, 252 Kan. 894, 850 P.2d 852 (1993). Administrative agencies are generally not empowered in Kansas to determine the constitutionality of a statute or administrative regulation. See Zarda v. State, 250 Kan. 364, 826 P.2d 1365 (1992), and In re Residency Application of Bybee, 236 Kan. 443, 691 P.2d 37 (1984).

Because the Appeals Board lacks the authority to adjudicate the constitutionality of K.S.A. 44-506, the decision of the Administrative law Judge remains in full force and effect.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Orders of Administrative Law Judge James R. Ward, both dated August 19, 1994, remain in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent from the opinion of the majority finding Kansas jurisdiction and applying the Kansas Workers Compensation Act to this case. Even if this Workers Compensation Appeals Board is not empowered to determine the constitutionality of a statute or administrative regulation, a point which is not settled in case law insofar as this

Board is concerned, this Board should nonetheless interpret and apply K.S.A. 44-506 consistent with settled principles of due process.

Our Court of Appeals in Odam v. Arthur Murray, Inc., 5 Kan. App. 2d 612 621 P.2d 453 (1980), rev. denied 229 Kan. 670 (1981), reviewed the general rules regarding limitations imposed by the due process clause of the Fourteenth Amendment to the United States Constitution upon a forum state's jurisdiction over nonresident defendants. Included therein is the principle that:

"A nonresident individual may, by his own acts in business relationships with a Kansas resident, become subject to in personam jurisdiction in the State of Kansas so long as there exist 'minimum contacts' between the nonresident and the forum." Id. at 615 quoting from Davis v. Grace, 4 Kan. App. 2d 704, Syl. ¶ 2, 610 P.2d 1140 (1980).

The Court in Odam goes on to hold:

"Three basic factors must coincide if jurisdiction is to be entertained over a nonresident on the basis of transaction of business within the state. These are (1) the nonresident must purposefully do some act or consummate some transaction in the forum state; (2) the claim for relief must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation." White v. Goldthwaite, 204 Kan. 83, Syl. ¶ 3, 460 P.2d 578 (1969).

While these are all cases interpreting K.S.A. 60-308(b)(1), it has been noted that essentially the same factors which enter into a determination of authority to exercise jurisdiction under that statute are likewise involved in deciding whether the exercise of jurisdiction is constitutionally valid. Woodring v. Hall, 200 Kan. 597, 603, 438 P.2d 135 (1968); Rosedale State Bank & Trust Co. v. Stringer, 2 Kan. App. 2d 331, 332, 579 P.2d 158 (1978).

Applying these standards to the facts of this case would, I submit, defeat Kansas jurisdiction and the applicability of the Kansas Workers Compensation Act. I need not go through that exercise now given the holding of the majority of the Board herein. The point of my dissent is that I would read these constitutional standards into K.S.A. 44-506 by requiring a showing that the requisite "minimum contacts" exist between respondent and the State of Kansas before finding the Kansas Act applies.

I will withhold judgement on whether this Board is empowered to decide the constitutionality of statutes. Granted the authorities cited by the majority speak to the contrary. However, this Board is substantially different from the administrative bodies involved in those decisions, not only in its composition but also, I would submit, in its unique mandate. In any event, any constitutional challenge to jurisdiction hinges upon factional issues. At the very least, these issues must be addressed at the administrative agency level so that the necessary factual record can be established for judicial review. See Robert v. Coughlin, 561 N.Y.S. 2d 852 (A.D. 3 Dept. 1990).

Board Member

cc: Larry T. Hughes, Attorney at Law, Topeka, KS
Eric T. Lanham, Attorney at Law, Kansas City, KS
James R. Ward, Administrative Law Judge
George Gomez, Director